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# Regulation of Concentration Through Merger Control: Germany's Continuing Efforts

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KURT STOCKMANN

The Federal Republic of Germany's Law Against Restraints on Competition (the ARC),<sup>1</sup> establishes an extensive regime for regulating market-dominating enterprises. Therefore, large corporations, both national and multinational, are the subject of particular scrutiny in the Federal Republic. Rather than identify and address all the provisions pertinent to corporate concentration (a task whose tedium would be matched only by its enormity), this analysis will undertake three tasks: (1) briefly describe the general scope of West German merger law, (2) discuss the application of the law to cases of transnational concentration, and (3) explain the proposed Fourth Amendment to the ARC as it affects merger control.

The German merger control law was introduced in 1973,<sup>2</sup> sixteen years after the basic antitrust statute—the ARC—had been enacted. At the outset, it should be noted that corporate concentration itself is not prohibited; rather, by framing the 1973 law in terms of "merger control," the German government premised the regulatory policy on corporate activities that created concentration—that is, mergers, acquisitions, and other actions or corporate arrangements.<sup>3</sup>

The merger control amendments to the ARC provide, in general, for two methods of enterprise concentration regulation—a notification procedure and a control procedure.<sup>4</sup> The notification procedure was formulated with the intent that it be used as an instrument for collecting comprehensive data on trends of corporate concentration. However, it is also used in conjunction with the techniques for preventing concentration.

The participating corporate enterprises in either a proposed or consum-

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This article is adapted from a presentation made by Mr. Stockmann at the Symposium on Transnational Corporate Concentration held at the University of Michigan Law School on November 9 and 10, 1979. Mr. Stockmann is chief, International Section of the Bundeskartellamt of the Federal Republic of Germany. Mr. Stockmann would like to thank Ms. Florence R. Keenan for her efforts in preparing this written contribution.

mated merger are obliged to notify the Federal Cartel Office (FCO) of the merger if the participating parties meet certain market share or absolute size criteria.<sup>5</sup> Under the "market share" criteria, all completed mergers must be reported to the FCO if, within the relevant geographic region (that is, either the national territory or a substantial part thereof, *e.g.*, the Saarland), the merger creates or augments a combined market share of 20 percent or more, or if one of the participating enterprises already possesses a 20 percent share in another market.<sup>6</sup> Thus, the reporting obligation extends not only to horizontal mergers, but to vertical and conglomerate mergers that involve a participant with a significant market share (20 percent or more) in another geographic or product market.<sup>7</sup> Failure to meet the notification requirements may lead to the imposition of fines.<sup>8</sup>

As a rule, the notification of a merger is required only after consummation of the merger. There is an exception, however, for particularly large mergers. Prior notification is required if the proposed merger involves at least two enterprises recording individual sales of at least one billion DM in the preceding fiscal year.<sup>9</sup>

Each enterprise participating in the merger must file a report with the FCO, specifying basic descriptive information such as the form of the merger, as well as the name, location, and business activity of the participating enterprises. More complex information is also required, including market share data and the basis for the market share computation, the number of employees and sales, and any details of relationships with other enterprises (for example, affiliation relationships, percentage holdings, and other forms of corporate control).<sup>10</sup>

The second step to the regulatory scheme—the merger control procedure—applies if a merger is likely to create or strengthen a market-dominating position.<sup>11</sup> If a merger is likely to create or strengthen a market-dominating position, the FCO has the authority to prohibit the merger.<sup>12</sup> If the merger has been consummated prior to the FCO's determination, it may be dissolved.<sup>13</sup> There is an important threshold level—500 million DM of combined sales between the merging enterprises—which, if not met, precludes the application of merger control.<sup>14</sup>

Moreover, the threshold of market dominance is very high, definitely higher than the threshold the U.S. antitrust law provides in Section 7 of the Clayton Act under the "lessening of competition" test.<sup>15</sup> The concept of a market-dominating position is defined in Section 22 of the ARC. Under this definition, an enterprise is market-dominating if it has either no competitor or is not exposed to substantial competition or occupies a paramount market position in relation to its competitors. As a matter of practice, the most important criterion for establishing market domination is market share.<sup>16</sup> The law creates a rebuttable presumption of market domination if an enterprise has a market share of one-third or more and annual sales of at least 250 million DM; or in the case of oligopoly, if three or less enterprises have a combined

market share of one-half or more, or five or less enterprises have combined market shares of two-thirds or more, and each of the enterprises has annual sales of at least 100 million DM.<sup>17</sup>

However, the concept of paramount market position—encompassing a rather fluid or broad spectrum of competitive circumstances—is of particular importance in coping with vertically integrated enterprises and conglomerates where strict reliance on market share criteria is of limited value for determining market domination.<sup>18</sup> Factors for determining paramount market position include market share, financial strength, access to supply or sales markets, links with other enterprises and the existence of legal or factual barriers to market entry.<sup>19</sup>

Turning the focus to the interests of the participating parties to a merger, the ARC provides several avenues for obtaining merger approval. If the FCO finds that the merger creates or strengthens a market-dominating position, the merger may still be approved if the participating parties can show: (1) that the merger will improve competitive conditions, and (2) that these improvements outweigh the detrimental effects of the market domination.<sup>20</sup>

In the event that the FCO has prohibited a merger, the participating enterprises may apply for authorization of the merger to the federal minister of economics. The minister will authorize the merger if the restraint on competition is balanced by the overall economic advantages of the merger, or if the merger is justified by an overriding public interest. In authorizing the merger, the minister can impose restrictions and requirements in order to preserve overall economic advantages or to protect the public interest. However, such conditions may not subject the participating enterprises to a continuous control of conduct.<sup>21</sup>

An appeal against the Federal Cartel Office's prohibition may also be taken to the Berlin Court of Appeals, and may be taken at the same time the enterprises apply for authorization from the federal minister of economics. The minister's decision may also be appealed. The appeals may be based on new facts and evidence, and the Federal Cartel Office's findings do not have *res judicata* effect in the Berlin Court of Appeals. Points of law are subject to further review on appeal by the Federal Supreme Court.<sup>22</sup>

In applying this law to cases of transnational concentration, it should be noted that the law does not distinguish between entirely domestic mergers and mergers involving foreign firms or even mergers realized exclusively between foreign firms. The jurisdictional test for the application of the law is whether there are effects in the German territory.<sup>23</sup> This is a very clear and unlimited adoption of the so-called effects principle as opposed to the conduct principle, which requires that at least part of the conduct causing relevant anticompetitive effects has taken place on the territory of the country assuming jurisdiction.

The exact scope and content of the "effects" test is a matter not yet resolved. In a number of earlier decisions, the Federal Supreme Court held

that there was no general notion of effects for jurisdictional purposes; rather the existence or absence of effects has to be judged in connection with the rule of substantive law invoked in any particular case. Otherwise the ARC provisions could be extended to a point which was not intended by the legislature.<sup>24</sup> For instance, if the legality of an export cartel is the question, whether there are effects in the Federal Republic of Germany for purposes of exerting jurisdiction has to be decided by interpreting the rule on export cartels.<sup>25</sup> Consequently, the applicability of ARC's notification and prohibition procedures depends on the interpretation of the substantive rule of law, *i.e.*, ARC §§23 and 24, and not only on § 98(2)'s effects doctrine.

A recent Supreme Court decision examining the relationship between the notification and control procedures may have potentially major ramifications for the application of the German merger control law to multinational corporations operating both within and without German territory. The case involved an acquisition completed in the United States of a New Jersey corporation, Allied Chemical Corporation (ACC) by another New Jersey corporation, Harmon Colors Corporation (HCC). HCC was wholly owned by Rhinechem Corporation (New York), which was wholly owned by Bayer International Finance N.V. (Dutch Antilles), which, in turn, was wholly owned by the appellant Bayer AG, a German producer and distributor of organic pigments. ACC also produced organic pigments and had developed a great expertise in the field although without achieving a substantial share of the market. Bayer AG and ACC together accounted for less than 4 percent of the organic pigments market in Germany in the year prior to the acquisition and slightly more than 4 percent in this year.

The FCO considered Bayer a party to this merger because its affiliate HCC (twice removed) was dependent on it as defined in Section 17(2) of the Joint Stock Companies Act. The FCO considered that Bayer AG was obliged to notify it of the acquisition by Bayer's affiliate HCC, regardless of the fact that the acquisition was completed abroad; it was sufficient that the German market is affected.<sup>26</sup>

The appellant argued that the decisive criterion for requiring notification of the merger under ARC Section 23(1) was whether a market dominating position was likely to be created or strengthened, *i.e.*, the criterion for merger prohibition under ARC Section 24(1). In essence, the appellants asserted that the need to comply with the ARC notification requirement was circumscribed by the jurisdictional elements for substantive merger control.

The FCO and the Berlin Court of Appeals had held that the notification procedure played an independent role in merger control, apart from the actual control provisions. The Supreme Court affirmed the government's position and rejected appellant's argument. The Supreme Court held that the notification of a merger can be required if it has a perceptible immediate effect on the conditions of competition in the relevant domestic market regardless of whether these effects are substantial or whether the merger will create or strengthen a position of market domination.<sup>27</sup> The Supreme

Court found perceptible direct effects on the domestic market in spite of the low market share of the parties because, as a result of the merger, ACC ceased to be a competitor, and Bayer, in addition to increasing its sales turnover, gained access to ACC's know-how from which Bayer hoped to derive an improved competitive position in relation to the leading competitor. That this could promote competition is irrelevant to the application of the notification requirement; it is relevant only in the context of merger prohibition.<sup>28</sup>

The consequences of this dramatic decision could be quite sweeping if the FCO enforces the notification requirement to the extent allowed by this decision. However, with the exception of the *Bayer* case, the FCO typically has been generous toward foreign participants in a merger, particularly with regard to notification requirements.<sup>29</sup> The FCO's policy of limiting the enforcement of the notification requirement is supported by three considerations. First, extraterritorial application of the ARC notification requirement does not necessarily promote the procedure's fundamental purposes of providing information on concentration developments within Germany and establishing a trigger mechanism for prohibition control where warranted. As the Supreme Court stated, the ARC's jurisdictional effects doctrine is not aimed at the situation found abroad as such, but at the domestic effect emerging as a result of a merger.<sup>30</sup> Second, strict enforcement of the limits allowed by the Supreme Court's decision would probably incur the international criticism of the sort precipitated by the extraterritorial application of U.S. antitrust law. Third, the restricted enforcement policy serves administrative convenience by alleviating the FCO's burden of data collection and analysis which would be onerous if the Supreme Court's decision was applied to its fullest extent.

The German legislature is also aware of this potential for broad enforcement of the notification requirements. At present it is contemplating how far considerations of international comity and the desire to avoid international conflicts might warrant a retrenchment of the Supreme Court's sweeping doctrine.

This leads to the final topic—the proposed Fourth Amendment to the ARC which embraces a tougher approach to corporate concentration. This draft amendment is now being discussed in the Bundestag's Committee on Economic Policy.<sup>31</sup> The government draft amendment, prepared by the Ministry for Economic Affairs, embraces two primary considerations: First, the draft evinces a concern to make merger control more effective with respect to vertical and conglomerate mergers. Although the experience since the enactment of a merger control law is relatively satisfactory with regard to horizontal concentrations, it is less satisfactory in regard to vertical and, in particular, conglomerate concentration. Historically, the entry of large enterprises into markets characterized by small- and medium-sized enterprises has tended to destroy or deteriorate the structure of these markets in a relatively short time.

The second consideration evinced in the amendment is a desire to close loopholes used by large, market-dominating enterprises to circumvent government control; this evasion has, to a large extent, disadvantaged small businesses. Large enterprises have abused the "affiliation clause" of ARC § 24(8)2 which exempts from control those mergers involving an enterprise with sales of less than 50 million DM in the preceding year. Of 260 mergers exempted in 1977, 230 fell within this affiliation clause. A great number of these mergers involved large enterprises acquiring medium-sized companies that fell below the 50 million DM threshold.<sup>32</sup> Some enterprises also have abused the intent of ARC § 23(2)2 (which defines mergers subject to control as those involving acquisitions of 25 percent of voting capital) by acquiring less than 25 percent voting capital yet simultaneously entering into arrangements to gain excessive influence within the acquired enterprise. Thus, in theory, these enterprises can escape merger control although, in fact, the FCO has considered such acquisitions evasions of the merger definition if the acquirer obtains the same legal position as if he had acquired a 25 percent share.<sup>33</sup>

To address these concerns, the Fourth Amendment proposes a number of changes to the law with respect to market dominating enterprises. Among the improvements proposed by the draft amendment are:

1. The inclusion of a provision to prevent the evasion of merger control by particular forms of voting rights and shareholdings;
2. The adoption of additional presumptions of market domination allowing better coverage of conglomerate and vertical mergers characterized by: (a) the penetration of large enterprises into markets characterized by small- and medium-sized firms, (b) the acquisition by a large firm of a market-dominating but smaller firm, and (c) the merger of several very large enterprises;
3. Better coverage of cases where oligopoly positions in important sectors of the economy are further strengthened as a result of a merger;
4. Modification of the affiliation clause so as to subject most mergers of large enterprises with small- and medium-sized firms to the merger control requirement;
5. Filling the legislative gap in the supervision of abuses by market-dominating enterprises by skimming off of pecuniary benefits earned as a result of an abuse, and rendering abuse decisions more immediately enforceable.<sup>34</sup>

The first of the above improvements expands the definition of merger and widens the range of mergers subject to the notification requirements. This would rectify the evasion from merger control by enterprises acquiring effective control of another enterprise although less than the 25 percent of the voting capital which defines *merger* under the current provision.<sup>35</sup>

The second recommended improvement creates presumptions with re-

spect to market domination that can be more easily applied to vertical and conglomerate mergers. The current presumptions of paramount market position have had practical effect in controlling primarily horizontal mergers. In practice, presumptions of paramount market position have been based on market shares and readily applied to horizontal mergers. In cases of vertical and conglomerate mergers, a merger does not result in a homogenous, aggregated market share since the relevant markets of each participating enterprise remain separate and distinct. The market share analysis used in horizontal concentration cases has not been easily adopted to these variegated market concentrations, thereby impeding effective control.<sup>36</sup> The amendment provides three presumptions that ease the burden of proof in the case of vertical and conglomerate mergers in establishing a paramount market position. The first presumption of paramount market position applies if an enterprise recording sales of at least two billion DM in the preceding year merges with an enterprise doing business in a market in which at least two-thirds of the market is attributable to small and medium enterprises. The second presumption exists if an enterprise recording sales of at least two billion DM in the preceding year merges with an enterprise recording sales of at least 100 million DM and is in a market-dominating position in one or more markets. The final presumption applies if the participating enterprises recorded a combined turnover of at least ten billion DM in the preceding year and at least two of the participating enterprises recorded individual turnovers of at least one billion DM. These presumptions serve as guidelines for enterprises contemplating a merger as well as standards for the FCO's prohibition control. The presumptions reach only large enterprises, thus maintaining the primary aim of merger control—to prohibit only mergers that threaten economic or social detriment.<sup>37</sup>

The oligopoly amendments would change the law's current market approach—based on competition within the oligopoly group—to one which considers whether a merger in an oligopolistic market creates or strengthens a market-dominating position. The Fourth Amendment's new criterion is restricted to merger control of important, closely knit oligopolies having a paramount market position in relation to other competitors. The proposed criterion should effectuate control of horizontal concentration trends in tight oligopolistic markets.<sup>38</sup>

The fourth recommended improvement addresses the affiliation clause exemption of certain mergers from control. As noted earlier, an unintended result of the affiliation clause (ARC § 24(8)2) has been that some large enterprises have penetrated into markets with primarily small- and medium-sized companies, thereby seriously deteriorating competitive structures. The exemption's sales turnover limit of fifty million DM would be lowered to two million DM, effectively eliminating this exemption. This amendment and the new presumptions regarding paramount market position together might to some extent improve conglomerate concentration control.

The fifth recommendation for improving ARC's control of market-



dominating enterprises is aimed at quickening the abuse proceedings and enlarging the sanctions against abuses by market-dominating enterprises. The amendment provides for the immediate enforceability of abuse decisions under § 22(5), eliminating the suspension effect the present law allows if an appeal is lodged. The cartel authority would still be able to forego the immediate enforcement of the decision, if the general public interest in early discontinuation of the abuse is outweighed by the possible hardship for the enterprise and the legal considerations associated with the particular circumstances. This fifth recommendation also provides for the payment of damages for the period between issuance of the decision and conclusion of the final appeal. It also provides for the skimming off of profits obtained by abuses after the decision is issued that are not offset by the payment of damages.<sup>39</sup> No more hidden gains from antitrust violations will be theoretically possible.

In summary, the Federal Republic of Germany has tried to adopt a flexible yet vigilant approach to regulating corporate concentration. Experience has shown that certain improvements would result in even more government involvement in, and control of, industrial structure and intercorporate activity in Germany. If the Fourth Amendment is enacted into law, the legislature will have evidenced its willingness to increase government involvement in structuring the Federal Republic's economy.<sup>40</sup>

As for the ARC and multinational corporations, the courts appear amenable to the extension of antitrust regulation, and specifically merger control, to foreign corporations whose activities affect the German economy and internal level of competition. To be certain, data on levels of transnational corporate concentration and merger activity will be gathered through the application of the merger notification requirement to foreign corporations. Inasmuch as this data can be a valuable first step toward actual control, a trend toward extraterritorial substantive regulation may develop with time. Moreover, enactment of the Fourth Amendment would probably generate additional momentum for increased extraterritorial scrutiny. However, awareness of the U.S. experience in extraterritorial antitrust enforcement, as well as the existent EEC antitrust regime that could be applied to transnational corporate activity, warrants a cautious approach in this area.

#### NOTES

1. Gesetz gegen Wettbewerbsbeschränkungen (Act Against Restraints of Competition) of July 27, 1957, BGBl. Teil I, 1081 (1957). (ARC).
2. Statute Amending the Act Against Restraints on Competition of August 3, 1973, BGBl., Teil I, 917 (1973).
3. ARC § 23(2) enumerates several transactions and arrangements that

are deemed to be mergers within the meaning of the law. These include certain acquisitions, takeovers, certain contractual arrangements, executive board appointments, and "any other relationship between or among enterprises on the basis of which one or several enterprises may exercise directly or indirectly a con-

- trolling influence over another enterprise." ARC § 23(2)5.
4. ARC §§ 23, 24, 24a.
  5. ARC §§ 23(1), 24(a)(1).
  6. ARC § 23(1)1.
  7. See, A. RIESENKAMPFF, GESETZ GEGEN WETTBEWERBS-BESCHRÄNKUNGEN 85 (1977).
  8. ARC § 39.
  9. ARC § 24a(1).
  10. ARC § 23(5).
  11. ARC § 24(1).
  12. ARC § 24(2).
  13. ARC § 24(2).
  14. ARC § 24(8)1.
  15. A number of antitrust experts have suggested that Germany move in the direction of the lower United States standard for restraints on competition in order to better effectuate control action.
  16. Court rulings indicate that the relevant product market includes all products so closely related by attribute, function, or price that an educated consumer regards these as interchangeably able to fulfill his need. See WuW/E BGH 990(991) "Papierfiltertüten II" E/BGH 1435 (1440) "Vitamin B<sub>12</sub>" and WuW/E BGH 1445 (1449) "Valium." Foreign markets are not considered by the Federal Cartel Office. However, the minister of economic affairs may do so under ARC § 24(3). He did, in fact authorize the acquisition of one of the largest German-owned oil companies, finding that the merger did not threaten the market economy since, on a worldwide scale, the resulting German enterprise was only medium in size. See WuW/E BMW 147 "Veba/Gelsenberg."
  17. ARC § 22(3)2.
  18. However, it should be noted that in administrative practice, the market share criterion has been given decisive weight in assessing these other factors and whether they demonstrate the existence of a market-dominating position. See, *Explanatory Memorandum to the Fourth Bill to Amend the Act Against Restraints of Competition of September 27, 1978*, German Bundestag, 8th Term, Document 8/2136, 27 (1978).
  19. ARC § 22(1)2.
  20. ARC § 24(1).
  21. ARC § 24(3). The Federal Cartel Office cannot take such criteria into account; it assesses the merger exclusively on the basis of its competitive aspects.
  22. ARC §§ 62–72; §§ 73–75.
  23. ARC § 98(2) which states:  
*This law applies to all restraints of competition which have effects within the territory in which this law applies, even if such effects are caused by actions taken outside such territory.*
  24. Judgment of 12 July 1973, Federal Supreme Court, W. Germany, BGH St 24, 208, 212; WuW/E BGH 1276 ff., 1279 (1973)—"Ölfeldröhre."
  25. Judgment of 12 July 1973, Federal Supreme Court, WuW/E BGH 1276; FEDERAL REPUBLIC OF GERMANY, B5, WORLD LAW OF COMPETITION, pt. 9, § 3.04(3)(j) (re application of the ARC to export cartels).
  26. Judgment of 29 May 1979, Federal Supreme Court, WuW/E BGH 1613 ff. (1979) "Organische Pigmente."
  27. *Id.* at 1615. The court held that the main rationale underlying Section 23 was not whether competition is or would be actually impaired, but that such an effect is likely due to the size of the parties to the merger and the competitive situation in the relevant market, and that the Federal Cartel Office must be allowed to observe economic concentration. The court did not address the issue of whether the ARC would apply to the participation of a German enterprise in a merger completed abroad when the acquired foreign enterprise is not

carrying on business within the Federal Republic. Also unanswered is whether the ARC would apply to a merger that involved a foreign corporation that was not engaged in any type of commerce in the German economy, but could still be considered a "potential entrant" for the future. As applied by U.S. antitrust authorities in international merger cases, the potential entrant doctrine has been severely criticized. See Fugate, *The Department of Justice's Antitrust Guide for International Operations*, 17 VA. J. INT'L L. 645, 661 (1977).

28. *Id.* at 1615.

29. The FCO has promulgated its own standards for enforcing merger control. The detailed standards are difficult to understand for someone not familiar with German antitrust law, but it is safe to say that they are far from the limits drawn by the Federal Supreme Court. With regard to foreign mergers involving foreign participants, the FCO scrutinizes only mergers in which at least one German company participates (thus disregarding all mergers involving only foreign participants). The standards also significantly narrow the qualifying range for notification by distinguishing between joint ventures and other forms of concentration.

The FCO summarized its interpretation of the ARC with regard to mergers involving foreign corporations as follows:

A.

*Effects on national territory are therefore present in any case, if a merger is realized within the area of application of the GWB [the ARC] (e.g. by the acquisition of the assets or shares of a domestic enterprise, establishment of a joint venture on national territory—even if the acquiring enterprises resp. [sic] the es-*

*tablishing enterprises are foreign enterprises). A merger realized abroad is in regard to domestic subsidiaries of the participants assumed to be a merger realized on national territory (Section 23(3) sentence 4 GWB).*

B.

*Mergers realized abroad have domestic effects, if the merger influences the structural conditions for domestic competition and if at least one domestic enterprise (also subsidiaries or other connected enterprises) is participating.*

*(1) If mergers are realized abroad between only two directly participating enterprises (all categories of mergers except joint ventures—e.g. the acquisition of the assets or the shares of a foreign enterprise by a domestic enterprise—)*

*(a) domestic effects are present, if both enterprises had been doing business on the national territory already before the merger, either directly or via subsidiaries, branch offices, or importers,*  
*(b) domestic effects may be present, if before the merger only one enterprise was doing business on national territory, but e.g.*

*(i) after the merger, supplies of a foreign participant into the national territory are likely because of reasons of production techniques (on higher or lower production levels) or because of relations to the domestic participant in regard to the range of products. Whether such future supplies are likely depends normally on whether such or similar products are already traded between the countries involved and such suppliers are not hindered by technical or administrative obstacles to trade;*  
*(ii) by the merger the know-*

*how of a domestic enterprise is perceptibly increased resp. [sic] commercial property rights are transferred on this enterprise.*

(2) *In cases of joint ventures established abroad, domestic effects depend primarily on the productive and geographic activity of the joint venture. Whether there are domestic effects in such cases is to be assessed in regard to the activity of the joint venture by observing the principles described under B.1. whereby the relationship in regard to production techniques and/or product range depends on the relationship between the joint venture and the domestic participant.*

*A joint venture realized abroad may also have domestic effects if*

*a) a foreign enterprise participating in the joint venture had been doing business in the field of business of the joint venture on the national territory, or if it is reasonably likely that it would start doing business on the national territory without the merger;*

*b) the domestic enterprise participating in the joint venture acquires production capacities to such extent that its domestic supply capacity is perceptibly changed (substitution of domestic production for exportation by production export). Precondition for such "perceptibility" is regularly an already powerful market position of the domestic participant.*

FEDERAL CARTEL OFFICE, ANNUAL ACTIVITY REPORT FOR 1975, 45 (1975). For examples of merger cases involving foreign participants cf. FEDERAL CARTEL OFFICE, ANNUAL ACTIVITY REPORTS FOR 1973, 70 (1973) and for 1974, at 34.

30. "Organische Pigmente" WuW/E BGH at 1615.
31. See annex 1 *infra*.
32. OECD, ANNUAL REPORTS ON COMPETITION POLICY IN OECD MEMBER COUNTRIES, 1978/No. 2 at 36.
33. *Id.*, 1977/No. 2 at 35 & 36.
34. Bill to Amend the Act Against Restraints of Competition of September 27, 1978, German Bundestag, 8th Term, Document 8/2136, 1-2, (1978). See annex 1 for translation of relevant provisions.
35. *Explanatory Memorandum*, *supra* note 18, at 30.
36. *Id.* at 26.
37. *Id.* at 25-27.
38. *Id.* at 25.
39. *Id.* at 29-32.
40. Indeed, as the *Explanatory Memorandum* states:  
*Business concentration can impair competition in the same way as cartelisation. It, too, can reduce the encouragement to efficient action and to achieving technical progress. As far as social policy is concerned, excessive concentration of economic power destroys the foundation of an order based on the principle of freedom. Political democracy and market economy are unthinkable without decentralised power.*  
*See Explanatory Memorandum, supra* note 18, at 24.

ANNEX 1: SELECTED EXCERPTS FROM THE "FOURTH BILL TO AMEND THE ACT AGAINST RESTRAINTS OF COMPETITION"

Article 1

The Act Against Restraints of Competition as published on 4 April 1974 (Legal Gazette I, p. 869), as amended by Article 59 of the Act of 14 December 1976 (Legal Gazette I, p. 3341) shall be amended as follows:

1. Section 12 shall be worded as follows:

"Section 12

(1) With regard to agreements and decisions of the nature described in Sections 2, 3, 5 (1) and (4), 5a (1) and 5b (1), the cartel authority may take the measures described in subsection (3),

1. insofar as the agreements and decisions or the manner of their implementation constitute an abuse of the market position obtained as a result of the exemption from Section 1, or
2. insofar as they violate the principles concerning trade in goods and commercial services accepted by the Federal Republic of Germany in international treaties.

(2) With regard to agreements and decisions of the nature described in Section 6 (1), the cartel authority may take the measures described in subsection (3), insofar as

1. the conditions mentioned in subsection (1) No. 2 are present, or
2. the implementation of the agreements or decisions substantially impairs predominating foreign trade and payments interests of the Federal Republic of Germany.

(3) The cartel authority may

1. direct the participating enterprises to discontinue the abuse objected to,
2. direct the participating enterprises to amend the agreements or decisions, or
3. declare the agreements and decisions to be of no effect."

2. Section 22 (3) sentence 2 shall be worded as follows:

"As regards the calculation of the market share and turnover, Section 23 (1) sentences 2 to 10 shall apply, as appropriate".

3. Section 23 shall be amended as follows:

(a) The following sentences 8, 9 and 10 shall be added to subsection (1):

"Where all or a substantial part of the assets of another enterprise are acquired, the calculation of the market share, number of employees and turnover of the selling enterprise shall take account of the sold assets only. Sentence 8 shall apply, as appropriate, to the acquisition of shares, insofar

as less than 25 per cent of the shares are retained by the seller and the merger does not satisfy the conditions set out in subsection (2) No. 2 sentence 3 and No. 5. If a person or an association of persons not being an enterprise is entitled to the majority interest in an enterprise, he, she or it shall be deemed to be an enterprise."

(b) In subsection (2) No. 2, sentences 4 and 5 shall be substituted for sentence 4:

"The acquisition of shares shall also be deemed a merger, insofar as the acquirer obtains, by means of an agreement, bylaws, articles of association, or a resolution, the legal position held in a joint stock company by a shareholder owning more than 25 per cent of the voting capital. Shares in an enterprise shall be equal to voting rights."

(c) Subsection (6) sentence 3 shall be worded as follows:

3. "Section 46 (2), (5) and (9) shall apply, as appropriate".

4. After Section 23 the following Section 23a shall be inserted:

"Section 23a

(1) Notwithstanding Section 22 (1) to (3), for merger control purposes a paramount market position shall be presumed to be created or strengthened as a result of a merger, if

1. an enterprise which recorded a turnover of at least DM 2,000 million in the last completed business year preceding the merger merges with another enterprise which
  - (a) operates in a market in which small and medium-sized enterprises have a combined market share of at least two thirds and the enterprises participating in the merger have a combined market share of at least 5 per cent, or
  - (b) is market-dominating in one or several markets which in the last completed calendar year had a turnover of at least DM 100 million, or
2. the enterprises participating in the merger recorded a combined turnover of at least DM 10,000 million in the last completed business year preceding the merger and at least two of the participating enterprises recorded individual turnovers of at least DM 1,000 million; this presumption shall not apply, insofar as the merger also satisfies the conditions of Section 23 (2) No. 2 sentence 3 and the joint venture does not operate in a market with a turnover of at least DM 500 million in the last calendar year.

(2) For merger control purposes two or three enterprises shall also be deemed market-dominating, if in one market they obtain the highest market shares and a combined market share of 50 per cent, except when the totality of enterprises have no paramount market position in relation to the other competitors. Sentence 1 shall not apply, if

1. that totality comprise [sic] enterprises which recorded turnovers of less than DM 500 million in the last completed business year, or
2. the merger exclusively affects a market which had a turnover of less than DM 100 million in the last calendar year, or
3. the enterprises participating in the merger obtain a combined market share not exceeding 15 per cent.

Section 22 subsections (1) to (3) shall remain unaffected.

(3) Section 23 (1) sentences 2 to 6 and 8 to 10 shall be applied regarding the calculation of the turnovers and market shares.”

5. Section 24 subsections (8) and (9) shall be worded as follows:

“(8) Subsections (1) to (7) shall not apply

1. if the participating enterprises recorded a combined turnover of less than DM 500 million in the last completed business year, or
2. if an enterprise which is not a controlled enterprise and in the last completed business year recorded a turnover of less than DM 50 million affiliates itself to another enterprise; except when one enterprise recorded a turnover of at least DM 2 million and the other a turnover of at least DM 1,000 million, or
3. insofar as a market is affected in which goods or commercial services have been supplied for at least five years and which in the last calendar year had a turnover of less than DM 10 million.

Section 23 (1) sentences 2 to 10 shall be applied regarding the calculation of the turnovers.

(9) Subsection (8) sentence 1 No. 2 shall not apply insofar as competition in the publication, production or distribution of newspapers or periodicals or parts of them is restricted within the meaning of subsection (1) as a result of the merger.”

6. Section 24a shall be amended as follows:

(a) Subsection (1) sentence 2 shall be worded as follows:

“The project shall be notified to the Federal Cartel Office, if

1. one of the enterprises participating in the merger recorded a turnover of at least DM 2,000 million in the last completed business year, or
2. at least two of the enterprises participating in the merger recorded individual turnovers of DM 1,000 million or over in the last completed business year, or
3. the merger is to be effected under the law of a Land by legislation or any other governmental act.”

(b) Subsection (1), sentence 5, shall be worded as follows:

“Section 46 (9) shall apply, as appropriate, to the information and documents obtained in connection with the notification.”

(c) Subsection (4) first half sentence shall be worded as follows:

"If a merger project has to be notified under subsection (1), sentence 2, it shall be unlawful either to complete the merger prior to the expiry of the one-month period specified in subsection (2) sentence 1, and, if the Federal Cartel Office has given the information referred to in subsection (2) sentence 1 prior to the expiry of the specified four-month period or the extension of time agreed upon, or to participate in the completion of the merger, except when the Federal Cartel Office, prior to the expiry of the periods mentioned in subsection (2) sentence 1 has given written information to the person who has effected the notification that the merger project does not meet the conditions of prohibition set out in Section 24 (1);"

7. Section 24 b (5) shall be worded as follows:

"(5) The Monopolies Commission shall issue every two years, by June 30, an opinion covering the situation which prevailed during the last two completed calendar years and submit it immediately to the Federal Government, the first opinion being due on June 30, 1976. The opinions pursuant to sentence 1 shall immediately be submitted to the legislative bodies by the Federal Government and at the same time by published by the Monopolies Commission. Within a reasonable period the Federal Government shall present its views and comments on the opinions to the legislative bodies. The Monopolies Commission may give additional opinions as it deems appropriate. The Federal Government may instruct it to give additional opinions. The Monopolies Commission shall submit opinions pursuant to sentences 4 and 5 to the Federal Government and publish them. The Federal Minister for Economic Affairs may also request an opinion from the Monopolies Commission in particular cases which are submitted to him for decision under Section 24 (3)."

8. Section 26 shall be amended as follows:

(a) In subsection (1) the words "certain enterprises" shall be substituted for the words "certain competitors".

(b) The following sentence 3 shall be added to subsection (2):

"For the prohibition procedure pursuant to Section 37a (2) a supplier of a certain type of goods or commercial services shall be presumed to depend on a purchaser within the meaning of sentence 2, if, in addition to the price reductions or other considerations customary in the trade, that purchaser regularly obtains special benefits not granted to similar purchasers".

(c) The following subsection (3) shall be added:

"(3) Market-dominating enterprises and associations of enterprises within the meaning of subsection (2) sentence 1 shall not use their market position to cause other enterprises in business activities to accord them preferential terms in the absence of facts justifying such terms. Sentence



1 shall also apply to enterprises and associations of enterprises within the meaning of subsection (2), sentence 2, in relation to the enterprises depending on them.”

9. Section 35 shall be amended as follows:

(a) Following subsection (1) the following subsection (2) shall be inserted:

“(2) Any person who wilfully or negligently contravenes any decision issued by the cartel authority or the appellate court within the meaning of subsection (1) shall, if the decision or determination pursuant to Section 70 (3) becomes final, compensate for any damage suffered from the date of service of the decision.”

(b) The former subsection (2) shall become subsection (3).